Filed 8/23/04 P. v. McCowan CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARGARET FORRESTER MCCOWAN, Defendant and Appellant.	D041941 (Super. Ct. Nos. SCD153053; SCD156576; SCD165051)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed in part and reversed in part.

A jury found Margaret McCowan guilty of possessing methamphetamine for sale in May 2000, and possessing methamphetamine and methadone in January 2002, and acquitted her of the remaining charged drug offenses. McCowan admitted the enhancement allegations that she was previously convicted of a narcotics-related offense (Health & Saf. Code, § 11370.2, subd. (c)), and that she committed the methamphetamine

and methadone possession counts when she was on bail (Pen. Code, § 12022.1, subd. (b)). The court sentenced McCowan to a seven-year prison term.[1]

McCowan appeals, contending the court erred in denying her suppression motion and failing to sua sponte give a pinpoint jury instruction pertaining to the constructive possession concept. We reject these contentions. McCowan also argues the enhancements must be stricken because the court failed to properly admonish her before she admitted the enhancement allegations. We agree, and reverse the enhancement findings. We remand for a retrial on the enhancement allegations and for resentencing if necessary.

FACTUAL AND PROCEDURAL BACKGROUND

The charged crimes arise from three different searches of McCowan's home during a 20-month period. We briefly summarize the results of those searches, and will set forth additional facts as relevant to the discussion of a particular legal issue.

In May 2000, McCowan was living in her home with two women: Vicki McMaster and Althea Kelso, McMaster's daughter. During a search of McCowan's home, police officers found a makeup bag containing 10.80 grams of methamphetamine in a series of small baggies. The makeup bag was found on top of a dresser in

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1 This sentence consisted of the two-year middle term for the possession for sale offense, plus the required three-year consecutive term for the prior narcotics related conviction enhancement, plus the required two-year consecutive term for one of the on-bail enhancements (the other on-bail enhancement sentence was stayed). The court imposed two-year middle-term sentences on the methamphetamine and codeine possession convictions, but these sentences were concurrent to the sentence on the possession for sale conviction.

McCowan's bedroom. Inside a dresser drawer was a baggie with .27 grams of methamphetamine, a bank bag containing $615 in cash, and some checks made payable to McCowan's alias. The police officers also found in the living room a digital scale and small baggies commonly used for narcotics. McCowan was arrested, and then released on bail.

Six months later, in November 2000, police officers again searched McCowan's home and found a small amount of methamphetamine under a computer keyboard on McCowan's desk in the living room. McCowan was arrested, and then released on bail after arraignment on charges arising from this search.

Approximately 14 months later, in January 2002, police officers conducted another search of McCowan's residence. At the time, McCowan was living with Randy Harner, and both occupied the master bedroom. Police officers found .27 grams of methamphetamine in a picture frame containing a photograph of McCowan's parents in the master bedroom, and narcotics paraphernalia in the garage. The officers also found various prescription bottles with medication in McCowan's kitchen. One bottle contained codeine pills and one contained methadone pills; neither had a prescription label with McCowan's name.

Before trial, McCowan moved to suppress the evidence found during the May 2000 search, arguing the police officers did not have a proper basis to initiate the search of her home and therefore all items found during the search must be suppressed under the "fruit of the poisonous tree" doctrine. The court denied the motion.

At trial, the charges relating to the illegal drugs found during the three searches were consolidated. In defense, McCowan argued the drugs found during each of the three searches either belonged to a third party or were lawfully in her possession. McCowan testified on her own behalf and presented various witnesses.

With respect to the methamphetamine found during the May 2000 search, one of McCowan's roommates at the time (Kelso) testified the makeup bag with the methamphetamine found in McCowan's bedroom actually belonged to Kelso's mother (McMaster), who lived in the garage. Kelso testified that during the time the officers were searching the home, she picked up the makeup bag from her mother's room because her mother usually kept tampons in it and she inadvertently left it on McCowan's dresser when she went to the shower.

With respect to the methamphetamine found under the computer keyboard during the November 2000 search, McCowan and various roommates testified that a variety of people used the computer.

With respect to the methamphetamine found in a picture frame in her bedroom during the January 2002 search, McCowan testified she did not put the methamphetamine in the picture frame nor did she know how it got there. With respect to the prescription drugs found during the January 2002 search, McCowan presented evidence showing that the codeine belonged to her roommate Harner, and the methadone was used by a woman suffering from terminal cancer for whom McCowan provided care.

At the conclusion of trial, the jury convicted McCowan of some of the charges and acquitted her of others. Specifically, McCowan was convicted of (1) possessing

methamphetamine with intent to sell (found in the makeup bag during the May 2000 search); (2) possessing methamphetamine (found in the picture frame during the January 2002 search); and (3) unlawfully possessing methadone (found during the January 2002 search). McCowan was acquitted of (1) possessing the methamphetamine (found under the keyboard during the November 2000 search); and (2) unlawfully possessing the codeine (found during the January 2002 search).

DISCUSSION

I. *Motion to Suppress Evidence*

McCowan contends the trial court erred in denying her motion to suppress the evidence found during the May 2000 search. At the time, McCowan's roommate, Vicki McMaster, was on probation with a Fourth Amendment search waiver. The prosecution justified the search on the basis that the police officers initiated the search based on McCowan's Fourth Amendment waiver, and then properly expanded the scope of the search after obtaining a search warrant. As she did below, McCowan challenges only the propriety of the Fourth Amendment waiver search.

A. *Facts Relevant to Suppression Motion*

On May 18, 2000, San Diego Police Officer Scott Christie and several other police officers came to McCowan's home to conduct a search pursuant to McMaster's Fourth Amendment waiver. When he arrived at McCowan's home, Officer Christie asked McCowan if McMaster lived at that address. McCowan said McMaster did live at the house, but that she lived solely in the garage and did not use any of the facilities within the house. Officer Christie responded that he intended to conduct a Fourth Amendment

waiver search only of McMaster's living area and therefore the search would be restricted to the garage area. McCowan then directed the officers to McMaster's room in the garage.

During the ensuing search of the garage, Officer Christie stayed with McCowan in the living room. While in the living room, Officer Christie observed that McCowan appeared to be under the influence of illegal drugs and he observed in plain sight items associated with drug usage, leading him to suspect that there may be evidence of criminal activity in other portions of the house. When McCowan refused to consent to an expanded search, the officers obtained a search warrant. Based on this search warrant, the officers then searched McCowan's bedroom and found the methamphetamine in the makeup bag and the other items supporting that McCowan possessed the methamphetamine for sale.

In moving to suppress this evidence, McCowan did not challenge the factual basis for the search warrant. She instead contended that the officers did not have a proper basis to conduct the initial Fourth Amendment waiver search, and therefore all of the evidence found must be suppressed under the "fruit of the poisonous tree" doctrine.

At the suppression hearing, the prosecution called Officer Christie to testify as to his reasons for conducting the Fourth Amendment waiver search on McMaster. He testified that approximately one week before the search he found a piece of paper with an address written on it in the pocket of a person arrested for possessing illegal drugs for sale. Officer Christie ran the address through the police computer system and learned McMaster and McCowan both resided at the address. Officer Christie then conducted

criminal background checks of both parties, which revealed McMaster was subject to a probation Fourth Amendment rights waiver. The computer system also revealed that McCowan had a criminal history involving narcotics. Officer Christie also received information from a narcotics detective that the police department had received a citizen's complaint regarding the residence.

On cross-examination, Officer Christie acknowledged that before conducting the search, he did not examine McMaster's court files or contact McMaster's probation officer or any other probation department official.

The court denied the suppression motion. The court found the police officers were aware of McMaster's Fourth Amendment waiver and that the officer did not conduct the search for an improper purpose or for an arbitrary or capricious reason.

B. *Legal Principles and Analysis*

In evaluating a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings, express or implied, if supported by substantial evidence. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.) We then exercise our independent judgment in determining whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment of the United States Constitution. (*Ibid*.)

"In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term." (*People v. Woods* (1999) 21 Cal.4th 668, 674 (*Woods*).) This search condition permits officers to search the probationer's residence without a warrant and without reasonable cause. (*Id*. at p. 675; *People v. Bravo* (1987) 43 Cal.3d 600, 610-611.) When a probationer lives with

others, law enforcement officers may conduct the search on the portions of the home occupied by the probationer, including shared living areas, such as bathrooms or living rooms. (See *Woods, supra*, at pp. 675-676.)

Under these principles, McCowan does not dispute that the officers acted within the *scope* of their Fourth Amendment waiver search when they searched the garage of McCowan's home, and then became aware of information of criminal activity to justify obtaining a warrant to search the rest of the home. But McCowan argues the search as to McMaster was unconstitutional because the officers did not have "probable cause" or "founded suspicion" to believe McMaster violated her probation terms.

The conceptual flaw with this argument is that the prosecution was not required to show the police officers suspected a probation violation or specific criminal activity to support the validity of the Fourth Amendment waiver search. (*People v. Bravo, supra,* 43 Cal.3d at pp. 607-610.) In *Bravo,* the California Supreme Court held that there is no requirement that a law enforcement officer have reasonable cause or reasonable suspicion of illegal activity before the officer may conduct a search of a probationer who has agreed to waive his or her Fourth Amendment rights. (*Ibid*.; accord, *People v. Mason* (1971) 5 Cal.3d 759, 765, disapproved of on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) In *Woods*, the high court reaffirmed this rule, and specifically declined the defendant's requests that it reconsider its prior holding. (*Woods, supra,* 21 Cal.4th at p. 675, fn. 2; see also *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180,

1194 [a probation search waiver permits police officers to search "without reasonable cause, that is, without any particularized suspicion of criminal conduct"].)[2]

As a qualification to this broad rule, the California Supreme Court has made clear that Fourth Amendment waiver searches on probationers may not "'be conducted for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes.'" (*Woods, supra,* 21 Cal.4th at p. 684.) This means that the search cannot be "undertaken for harassment or . . . for arbitrary or capricious reasons." (*People v. Bravo*, *supra*, 43 Cal.3d at p. 610; see *Woods*, *supra*, at p. 691.) In *Woods*, the court held an objective analysis is used to determine whether a search has a proper probationary justification. (*Woods, supra,* at p. 672.) Thus, the officer's subjective motivation for the Fourth Amendment search is not relevant. (*Ibid*.)

In this case, the superior court found that the evidence, viewed objectively, did not support McCowan's claims that the search was arbitrary and capricious and that it was not reasonably related to a probationary purpose. We concur in this finding. The evidence showed Officer Christie conducted a Fourth Amendment waiver search of McMaster's living quarters after he found a paper with the address of the home in the pocket of an individual who had been arrested for narcotics sales, and after the officer had learned of McMaster's Fourth Amendment waiver and narcotics history and that a

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2 In *United States v. Knights* (2001) 534 U.S. 112, the United States Supreme Court acknowledged *Woods'*s holding and declined to reach the issue whether a reasonable suspicion standard was necessary for a search of a probationer who had waived his or her Fourth Amendment rights. (*Id.* at p. 120, fn. 6.)

citizen had complained about the house in which McMaster was living.[3] Viewed objectively, this information shows the officer's decision to conduct a search of McMaster's living areas was reasonably related to proper law enforcement objectives of ensuring McMaster was not continuing to engage in illegal narcotics activity and that she was remaining a law abiding citizen. (See *People v. Bravo*, *supra*, 43 Cal.3d at p. 610; *People v. Mason, supra,* 5 Cal.3d at p. 764; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67.)

McCowan's reliance on *People v. Robles* (2000) 23 Cal.4th 789 for a contrary conclusion is misplaced. In that case, the police officers were *unaware* the defendant's roommate was a probationer who had waived his Fourth Amendment rights. (*Id*. at pp. 793-794.) The court held the search violated the Fourth Amendment, reasoning that "if officers lack knowledge of a probationer's advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority." (*Id*. at p. 797; see also *People v. Sanders* (2003) 31 Cal.4th 318, 335 ["an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted"].)[4]

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3 Contrary to McCowan's assertions, the record shows Officer Christie learned of this citizen's complaint before he entered the home.

4 Two recent decisions cited by McCowan's counsel at oral argument are similarly distinguishable. (See *People v. Hoeninghaus, supra,* 120 Cal.App.4th 1180; *People v.*

These principles are inapplicable here. It is undisputed that the officers who conducted the search knew McMaster was a probationer who had waived her Fourth Amendment rights. The officers acted with commendable care to ensure the scope of the search was limited to McMaster's living quarters. It is only when the officers discovered the additional information about possible criminal activity in the home that the officers obtained a search warrant and then searched the remaining portions of McCowan's house. This record does not support the conclusion that the search was undertaken for harassment purposes or was arbitrary or capricious. (See *Woods*, *supra*, 21 Cal.4th at p. 691.)

II. "*Mere Proximity*" *Instruction*

McCowan next contends the trial court erred when it failed to instruct, sua sponte, that her "mere proximity" to the controlled substances does not constitute constructive possession.

To prove the possession offenses, the prosecution was required to show McCowan actually or constructively possessed the illegal drugs. (See *People v. Morante* (1999) 20 Cal.4th 403, 417.) With respect to this possession element, the court instructed the jury: "There are two kinds of possession: actual possession and constructive possession. Actual possession requires that a person knowingly exercise direct physical control over a thing. Constructive possession does not require actual possession*, but does require that a person knowingly exercise control over or the right to control a thing, either directly or*

Lazalde (2004) 120 Cal.App.4th 858.) In each of these cases, it was undisputed the

through another person or persons." (Italics added.) The court also instructed the jury that the prosecution had the burden of proving McCowan (1) "exercised control over or the right to control . . . a controlled substance"; (2) "knew of its presence"; and (3) "knew of its nature as a controlled substance."

These instructions properly reflect the applicable law. (See *People v. Morante*, *supra,* 20 Cal.4th at p. 417.) The given instructions made clear to the jury that the prosecution must show McCowan "*knowingly exercise[d] control*" over the drugs, and therefore McCowan's physical proximity to the drugs and/or McCowan's access to the drugs could not alone establish her guilt. Thus, it was unnecessary to additionally instruct that McCowan's "mere proximity" to the drugs was insufficient to find she was guilty of the possession offenses. (See *People v. Jeffers* (1996) 41 Cal.App.4th 917, 923-924.) A court is not required to give duplicative instructions, even if they are legally correct. (*People v. Brown* (2003) 31 Cal.4th 518, 559.)

Moreover, McCowan waived the contention by failing to request the pinpoint instruction. A trial court must instruct sua sponte on general legal principles necessary for the jury's proper understanding of the case. (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) A defendant waives the appellate argument that an instruction was too general if the defendant failed to request an instruction to pinpoint or clarify the issue. (See *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1218.)

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searching officer was unaware of the applicable search waiver condition.

McCowan alternatively argues counsel was ineffective for failing to request clarification of the instruction. However, to prevail on this contention, an appellant must show there is a reasonable probability the appellant would have obtained a more favorable outcome absent the claimed deficiency in counsel's performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Sapp* (2003) 31 Cal.4th 240, 263.)

In this case, it is not reasonably probable the outcome would have been different if the "mere proximity" instruction had been given. As discussed, the instruction was essentially duplicative of the given instructions. Although the proximity instruction would have highlighted the need for the jury to find McCowan was aware of the drugs and that she had control over them, the jury was told of these required elements through the given instructions and counsel's arguments. The fact the jury acquitted McCowan of the possession charges on the methamphetamine found in November 2000 and the codeine medication found in January 2002 demonstrates the jury understood the constructive possession element required the prosecution to show control and knowledge, and not merely that McCowan had access to the drugs. There is no reasonable probability that, but for counsel's failure to request the instruction, a determination more favorable to McCowan would have resulted.

III. *Yurko Error*

McCowan contends the trial court did not properly advise her of her *Yurko* rights before admitting the truth of three enhancement allegations: (1) a prior narcotics related conviction (Health & Saf. Code, § 11370.2, subd. (c)); and (2) committing two of the counts while on bail (Pen. Code, § 12022.1, subd. (b)). The Attorney General

acknowledges the court did not advise McCowan of any of her *Yurko* rights before she admitted these enhancement allegations, but argues the record shows her admissions were nonetheless "'voluntary and intelligent.'"

In *In re Yurko* (1974) 10 Cal.3d 857, 861-865, our Supreme Court held trial courts are constitutionally required to advise defendants who intend to admit prior convictions that they have the right to a jury trial for each enhancement allegation, the right to confront and cross-examine witnesses, and the right against self-incrimination. (See *People v. Campbell* (1999) 76 Cal.App.4th 305, 309-310.) The California Supreme Court later clarified that in determining whether the court committed reversible error in failing to provide the necessary advisements, the pertinent inquiry is whether "the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances." (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

Our high court recently reaffirmed the *Howard* rule and emphasized that "an appellate court must go beyond the courtroom [plea] colloquy to assess a claim of *Yurko* error" and "must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*People v. Mosby* (2004) 33 Cal.4th 353, 361 (*Mosby*).) Applying these principles, *Mosby* cited with approval those decisions holding that if a defendant is *not advised of the right to a trial on an alleged prior conviction*, a court generally "cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*Id*. at p. 362; see *People v. Campbell, supra,* 76 Cal.App.4th at pp. 310-

311; *People v. Stills* (1994) 29 Cal.App.4th 1766, 1769-1771; *People v. Moore* (1992) 8 Cal.App.4th 411, 416-418.)

The *Mosby* court contrasted these "silent record" decisions with the factual circumstances before it where the defendant *was advised of the right to a trial* on the priors and the defendant had just completed a contested jury trial, but was not specifically told of his rights to confront witnesses and the right against self-incrimination. (*Mosby, supra,* 33 Cal.4th at pp. 362-365.) The court found that under these circumstances the *Yurko* error was not reversible because the defendant would have reasonably understood that the right to a trial *included* the related rights to remain silent and to confront witnesses. (*Mosby, supra,* at pp. 364-365.)

Unlike the facts in *Mosby*, the record here is devoid of any information suggesting McCowan knew she had a right to a trial on the alleged enhancements. Before the jury returned its verdict, the court asked defense counsel whether his client wanted to admit to the enhancement allegations. Although defense counsel initially questioned the basis for several of the alleged enhancements and there was some uncertainty as to the underlying factual basis for the enhancements, defense counsel ultimately stated McCowan would admit the allegations. McCowan was then sworn, and the court immediately began reading each of the alleged enhancements, and then asked McCowan whether she would admit the allegation. After each enhancement was read, McCowan stated she admitted the allegation.

The Attorney General concedes the court never told McCowan of her right to a jury trial or other related rights, but nonetheless suggests that defense counsel's

statements to the court immediately before McCowan's admissions implicitly reflect that counsel "discussed the options" with McCowan and therefore the waiver must have been voluntarily and intelligently made. This argument is unavailing because the *Mosby* court made clear that on a "silent record" where the court does not expressly advise on the record of the right to a trial, it will generally be "'impossible to determine'" whether the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation. (*Mosby, supra,* 33 Cal.4th at p. 362, quoting *People v. Johnson* (1993) 15 Cal.App.4th 169, 178.)

The Attorney General's argument is also factually unsupported. The record does not show defense counsel told McCowan of her rights to a jury trial, or that McCowan admitted a jury trial would be "futile." To the contrary, the record discloses the court and counsel were initially unclear as to the precise nature of the enhancements allegations, and that there were some unresolved issues when McCowan admitted to the offenses. On this record, we cannot reasonably infer counsel communicated the necessary advisements to McCowan.

We also reject the Attorney General's contention that we should infer McCowan intelligently and voluntarily waived her rights merely because she had experience and familiarity with the criminal justice system. In *Campbell*, this court rejected the identical contention, stating, "If this experience were sufficient to constitute a voluntary and intelligent waiver of constitutional rights, courts would rarely be required to give *Boykin/Tahl* admonitions." (*People v. Campbell, supra,* 76 Cal.App.4th at p. 310.) In *Mosby*, the court agreed with this reasoning when it cited *Campbell* with approval in

support of the principle that a court cannot imply a knowing waiver on a silent record. (*Mosby*, *supra*, 33 Cal.4th at pp. 362-363.)

We reverse the enhancement admissions and order a retrial on the enhancements.[5] In so doing, we reiterate the importance of giving the proper admonitions on the record and echo the Supreme Court's recent observation that failing to give full advisements and obtain express waivers imposes a high cost on this state's limited judicial resources in our trial and appellate court systems. (*People v. Mosby, supra*, 33 Cal.4th at p. 365; see *People v. Campbell, supra,* 76 Cal.App.4th at p. 311.)

DISPOSITION

The convictions are affirmed. We reverse the true findings on the three enhancement allegations based on McCowan's admissions (Pen. Code, § 12022.1, subd. (b); Health & Saf. Code, § 11370.2, subd. (c)), and the matter is remanded to the trial court to determine the truth of these allegations and for resentencing if necessary.

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5 To the extent McCowan argues she is entitled to a reversal without a retrial, this argument is unsupported. (See *People v. Campbell*, *supra*, 76 Cal.App.4th at p. 311; see also *People v. Barragan* (2004) 32 Cal.4th 236, 241.) Penal Code section 1158, relied upon by McCowan, applies only where there was no true finding or admission on the record.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.